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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

FILE:



Office: NEBRASKA SERVICE CENTER

Date: AUG 05 2010

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a business analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Permanent Employment Certification (ETA Form 9089) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a U.S. Master's degree in business administration or foreign equivalent degree required by the certified ETA Form 9089. Accordingly, the petition was denied.

On appeal, counsel asserts that the petitioner established the beneficiary's educational qualifications with the evaluation stating that the beneficiary attained the equivalent of U.S. Master's degree based on the beneficiary's Post-graduate Diploma in management from the [REDACTED] in Pune, India.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The record contains the beneficiary's bachelor of commerce granted on September 16, 2000 and transcripts for three years of studies from [REDACTED]

[REDACTED] in India, and Post-Graduate Diploma in Management issued on September 28, 2001 and transcripts for two years of studies from [REDACTED]. Thus, the issues are whether each degree or diploma is, on its own, a single source foreign equivalent to a U.S. master's degree, if not, whether each of them is, on its own, a single source foreign equivalent to a U.S. baccalaureate degree plus five years of experience. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree*.

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree.

Matter of Shah, 17 I&N Dec. at 245. In the instant case, the three-year bachelor of commerce degree from the University of Delhi is not the foreign equivalent degree to a U.S. baccalaureate degree.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.accrao.org, is “a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://accraoedge.accrao.org/register/index.php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

EDGE confirms that while a bachelor of commerce awarded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate or equivalent represents attainment of a level of education comparable to two to three years of university study in the United States, the three year bachelor of commerce degree is not the foreign equivalent degree to a U.S. baccalaureate degree.

EDGE provides a great deal of information about the educational system in India. It discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor’s degree “represents attainment of a level of education comparable to a bachelor’s degree in the United States.” The “Advice to Author Notes,” however, provides:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor’s degree.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an “official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree.” For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.” We cannot conclude that the evidence required to demonstrate that an alien

is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a “baccalaureate means a bachelor’s degree received *from a college or university*, or an equivalent degree.” (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability”). In this case, the record does not contain evidence showing that [REDACTED] is an accredited university or institution approved by the AICTE, and therefore, the masters diploma in computer application issued by [REDACTED] in association with NIIT cannot be considered as a single source foreign degree equivalent to a U.S. bachelor’s degree.

The record also contains a post-graduate diploma in management awarded to the beneficiary upon completion of two-year full-time program in management. Counsel claims on appeal that the [REDACTED] now [REDACTED], is an AICTE approved institute. The transcripts in the record indicate that the beneficiary completed two years of study at the [REDACTED] and was awarded the post-graduate diploma in management on September 28, 2001. Although the website of [REDACTED] indicates that [REDACTED] is an AICTE approved institute, the record does not contain independent and objective evidence showing that the [REDACTED] was authorized to grant and actually granted the beneficiary a post-graduate diploma equivalent to a U.S. master’s degree. Therefore, the beneficiary’s post-graduate diploma in management from the [REDACTED] is not a single source of foreign degree equivalent to a U.S. master’s degree or MBA degree.

The record contains educational evaluations stating that the beneficiary’s post-graduate diploma in management from the [REDACTED] in Pune, India upon completion of two years of studies following his three year bachelor of commerce is the foreign equivalent degree to a U.S. master of business administration degree. U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

EDGE confirms that while the post-graduate diploma, following a two-year bachelor’s degree, represents attainment of a level of education comparable to one year of university study in the United States, the post-graduate diploma, following a three-year bachelor’s degree, represents attainment of a level of education comparable to a bachelor’s degree in the United States. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). Here the beneficiary’s post-graduate diploma in management from the [REDACTED] represents attainment of a level of education comparable to a bachelor’s degree in management or business administration in the United States.

Therefore, the beneficiary has a “United States baccalaureate degree or a foreign equivalent degree,” and thus, meets the minimum level of education required for the equivalent of an advanced degree, namely a Bachelor’s degree, for preference visa classification under section 203(b)(2) of the Act. However, to qualify for the second preference classification, the beneficiary must establish that he possessed at least five years of progressive experience in the specialty after his bachelor’s equivalent degree but prior to the priority date.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS’s decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: “The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, “Job Opportunity Information,” describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which

USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, lines 4, 7 and 9, of the labor certification reflect that a master's degree in business administration, management or related field or a foreign educational equivalent is the minimum level of education required. Lines 5, 6, 8 and 10 reflect that the proffered position does not require any training or experience and that the petitioner will not accept an alternate combination of education and experience. The beneficiary possesses a three-year bachelor of commerce from the University of Delhi, a masters diploma in computer application from [REDACTED] in association with [REDACTED] and post-graduate diploma in management from [REDACTED]. None of them is, on its own, the equivalent to a U.S. master's degree. Therefore, the beneficiary does not meet the minimum educational requirements set forth on the ETA Form 90899.

However, the beneficiary obtained his bachelor equivalent degree based on the two-year post-graduate diploma in management from [REDACTED] and the three-year bachelor of commerce from the University of Delhi. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2). Therefore, to qualify for the second preference classification, the beneficiary must establish that he possessed at least five years of progressive experience in the specialty after his bachelor's equivalent degree but prior to the priority date.

In addition, the regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains two letters pertinent to the beneficiary's requisite experience. The first letter is dated October 6, 2005 signed by [REDACTED]

[REDACTED] This letter from the beneficiary's former employer certifies that the beneficiary worked for the company as a full-time systems analyst from May 31, 2006 to September 21, 2006. However, the position the beneficiary worked for the company is a systems analyst but the degree required by the labor certification is a master's degree in business administration or management. Therefore, the experience as a systems analyst at [REDACTED] is not qualified for the

experience in the specialty required by the regulations. Furthermore, this letter does not include a description of the duties the beneficiary performed as the regulation requires. Without such a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the experience the beneficiary obtained from the employment with this employer enables him to perform the duties set forth on the ETA Form 9089 and further qualifies him for the proffered position. Therefore, the AAO cannot accept and consider this letter as primary evidence to establish the beneficiary's requisite experience.

The second letter is dated June 10, 2005 from [REDACTED] Vice President-Human Resources of [REDACTED]. This letter verifies the beneficiary's employment with that company from February 2004 to May 14, 2005. While the experience as a business analyst is in the specialty, this letter does not include a description of the duties the beneficiary performed as the regulation requires. Without such a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the experience the beneficiary obtained from the employment with this employer enables him to perform the duties set forth on the ETA Form 9089 and further qualifies him for the proffered position. Therefore, the AAO cannot accept and consider this letter as primary evidence to establish the beneficiary's requisite experience.

The record does not contain any other experience verification documents pertinent to the beneficiary's requisite experience for the proffered position. Therefore, the record does not contain regulatory-prescribed evidence to establish the beneficiary's five years of progressive experience in the specialty.

The beneficiary has a "United States baccalaureate degree or a foreign equivalent degree," but does not have the required five years of experience in the specialty, and thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. Therefore, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.